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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CRAIG E. HARRISON, Plaintiff and Appellant, v. THE CAPITAL GROUP COMPANIES, INC., et al., Defendants and Respondents.	G040519 (Super. Ct. No. 07CC00577) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dennis S. Choate, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.); and Peter J. Polos, Judge. Affirmed.

Michelman & Robinson and Jeffrey D. Farrow; Craig E. Harrison, in pro. per., for Plaintiff and Appellant.

Bate, Peterson, Deacon, Zinn & Young, Linda Van Winkle Deacon and Stephanie M. Saito for Defendants and Respondents.

* * *

This is plaintiff Craig Harrison's third lawsuit against The Capital Group Companies (CGC) a company for whom he worked as a contractor for several months in 2003. On this occasion, he sued CGC and one of its employees, Susan Sherwood, for defamation arising out of a conversation that Sherwood had with a third party in October 2003. The trial court found, and we agree, that Harrison's claim is barred by the statute of limitations. We find that his remaining arguments, relating to the recusal of the trial judge, discovery matters, the denial of a continuance, and a new trial motion, also lack merit. We therefore affirm the judgment.

I

FACTS

This is Harrison's third lawsuit relating to his brief work as a contractor with CGC. As we stated in our prior opinion: "In February 2003, plaintiff Craig Harrison's consulting company, MPAQ Systems, Inc. entered into a contract through a third party, Surrex Solutions (Surrex), to provide consulting services to The Capital Group Companies (CGC). The written agreement specified that Harrison was an independent contractor.

"When Harrison began work for CGC, he received work assignments from Anthony Gadd-Claxton. Susan Sherwood was Gadd-Claxton's supervisor. At some point, Sherwood began giving assignments to Harrison directly. Harrison apparently resented this, because it put him in conflict with Gadd-Claxton. Sherwood asked Harrison to 'evaluate' Gadd-Claxton's work and provide recommendations for changes going forward. When Harrison told Sherwood the assignment was causing conflict between himself and Gadd-Claxton, Sherwood informed him that he worked for her, not Gadd-Claxton.

"Harrison also believed that the problems were exacerbated by Sherwood's practice of asking him and Gadd-Claxton the same question, even if their answers might

conflict. Harrison believed Sherwood was communicating with him more than Gadd-Claxton about a project that had once been his responsibility.

"Harrison further contended that Sherwood insisted in several situations that he work hours but not record them on his timesheet, thus not billing CGC. They also differed regarding his schedule, and Harrison asserted that at least one similarly situated female colleague was treated in a more favorable manner.

"In addition to his complaints about Sherwood's supervision, Harrison also came into conflict with a coworker, Florence Mansfield. Mansfield came into the group in which Harrison was working in approximately May 2003 as a project manager, and her primary function was to act as a liaison between Harrison and CGC. He felt that they initially got along fine, but her attitude toward him changed. Harrison felt that Mansfield was hostile to him, and 'would speak to me and walk off or yell something at me and start walking off.' Further, Mansfield would 'order [him] around,' appear 'irritated' by him, or yell at him.

"The incident which Harrison described as the most 'egregious' was one in which Mansfield approached Harrison's desk with 'less than ten sheets' of stapled paper. Mansfield dropped the paper on Harrison's desk, and it 'hit the desk and then slid across the desk' and hit him in the torso.

"CGC terminated Harrison's services under the contract after an 'interaction' he had with Mansfield. Harrison complained to Sherwood, which apparently upset Mansfield. At the time, Harrison's contract with CGC was up and he did not have a new contract. Harrison was told not to come back into work.[1]

[1] Harrison was called the day after he left CGC by Bob Bishop, a representative of Surrex, the primary contractor to CGC. (Harrison was Surrex's subcontractor.) Bishop told Harrison that he had spoken to Sherwood, and because Harrison "had some issue with [Mansfield]" as well as with another coworker, Harrison was not to return to CGC.

"Harrison, along with Gadd-Claxton and another individual named Jeffrey Wert (who are not parties to this appeal) filed a complaint against CGC, Sherwood and Mansfield in July 2005[2] alleging, sexual harassment, termination in violation of public policy, battery, breach of contract, breach of the implied covenant of good faith and fair dealing, failure to pay wages, and waiting time penalties.

"In July 2006, defendants filed a motion for summary judgment and/or adjudication. While this motion was pending, on September 19, 2006, Harrison filed a motion to amend his complaint to add a cause of action for defamation. The motion stated that during discovery, handwritten notes by Sherwood had been discovered. These notes, directed to Surrex, stated that Harrison was 'untruthful' and had been overheard 'bad-mouthing' a coworker and supervisor. He alleged that since the termination of his CGC contract, he had not procured further work through Surrex. Defendants opposed, arguing that the motion had been filed only one week before the discovery cut-off and five weeks before trial; a very short time, particularly given that Harrison had been aware of the relevant facts since July 2006. They further argued amendment would be pointless, claiming Harrison offered no facts that would overcome the common interest privilege and because the claim was time-barred.

"The court heard argument on September 26. The court granted the motion for summary judgment and denied leave to amend the complaint. On October 17, Harrison filed a notice of substitution, relieving his attorneys and stating that he was representing himself. He continues that representation on appeal. On October 25, the court entered judgment in favor of defendants and against CGC. Harrison now appeals, limiting his argument to the court's grant of summary judgment on the sexual harassment

[2] The prior case was originally filed in October 2003, although it was eventually dismissed and refiled in July 2005, In Harrison's original, verified complaint, he alleged Sherwood "threatened Plaintiff with unjust harm to reputation" to compel him to work unpaid hours.

claim and its decision to deny him leave to amend his complaint."[3] (*Harrison v. Capital Group* (Mar. 21, 2008, G038127) [nonpub. opn.], fns. omitted.)

We affirmed the judgment, finding that Harrison's sexual harassment claim, which did not allege any harassment of a sexual nature, did not constitute sexual harassment as a matter of law. (*Harrison v. Capital Group, supra,* G038127.) We also found that the trial court did not abuse its discretion by refusing Harrison leave to amend his complaint to add a defamation claim less than five weeks before trial. We noted that the facts that purportedly supported the defamation action came to light several months prior, during Sherwood's deposition. We found the record showed a lack of diligence on Harrison's part, and thus, the trial court did not abuse its discretion. We also noted, in a footnote: "It is also highly likely that Harrison's defamation claim was time-barred, but as the court did not abuse its discretion, we need not consider this issue." (*Id.*, fn. 5.)

In January 2007, Harrison filed the instant action, alleging a single cause of action for defamation against CGC and Sherwood (defendants). The complaint alleged the defamatory comments were the same statements alleged in the prior action, specifically, that Sherwood had written in her October 2003 notes of her conversation with Bob Bishop of Surrex (CGC's contractor, for whom Harrison worked as a subcontactor) that she said Harrison was "untruthful" and had been overheard "bad-mouthing" coworkers. He alleged that since his termination, he had been unable to obtain further work through Surrex. The complaint stated that he had not discovered the purported defamation until Sherwood's deposition in July 2006.

On January 24, 2008, the Honorable Dennis S. Choate granted defendants' motion for summary judgment. During the hearing, a discussion on the statute of limitations took place. Judge Choate commented: "We've all committed defamation in

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[3] CGC and Sherwood request we take judicial notice of portions of the record on appeal in the earlier case. Pursuant to Evidence Code sections 452, subdivision (a) and 453, the request is granted.

our life, all of us have, and the Legislature says, you know, on these kind[s] of cases, we're not going to let it go on for five years where somebody can come back five years later and sue somebody for something that happened five years ago, we're going to set a statute of limitations for this action, and they set it at one year. Looks like it's outside the statute." After further argument, Judge Choate found that as a matter of law, Harrison was on inquiry notice once he learned of Bishop's conversation with Sherwood, and there was no tolling. Thus, Harrison was barred from proceeding and summary judgment was granted. Defendants were directed to prepare an appropriate order. The following day, January 25, Judge Choate retired.

On March 10, before the order was signed, Harrison filed a motion for a new trial, claiming there was an "errors of law" and "insufficiency of the evidence" to warrant summary judgment, as well as "newly discovered evidence" and "irregularity in the proceedings." Further, on April 16, Harrison, who was representing himself at this point in the case, moved to disqualify Judge Choate pursuant to Code of Civil Procedure section 170.1. His motion was based entirely on Judge Choate's comment that "We've all committed defamation in our life, all of us have . . . ." According to Harrison, Judge Choate was an "admitted defamer and tortfeasor" and therefore biased.

At a hearing on April 16, Judge Choate accepted the motion for filing and declined to respond, instead choosing to transfer the matter for reassignment. Judge Choate did sign the order granting the motion for summary judgment. The case was reassigned to Judge Polos, who denied Harrison's motion for a new trial on April 24. On May 9, Judge Polos signed the judgment in defendants' favor. This appeal follows.

II

DISCUSSION

Summary Judgment re Defamation

Harrison's defamation claim, as discussed above, is based on two comments made during one conversation between Sherwood and Bishop on October 24,

2003. Specifically, Harrison alleges that Sherwood defamed him by telling Bishop that Harrison was "untruthful" and had been overheard "bad-mouthing" coworkers. The trial court found that as a matter of law, Harrison's claim was barred by the statute of limitations, and the statute had not been tolled.

This court reviews de novo the trial court's decision to grant summary judgment. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.) Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) To prevail on the motion, a defendant must demonstrate the plaintiff's cause of action has no merit. This requirement can be satisfied by showing either one or more elements of the cause of action cannot be established or that a complete defense exists. (Code Civ. Proc., § 437c, subds. (o), (p); *Bardin v. Lockheed Aeronautical Systems Co.* (1999) 70 Cal.App.4th 494, 499-500.) If the defendant meets this requirement, the burden shifts to the plaintiff to demonstrate a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2); *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 72.)

Defendants assert that the statute of limitations is, in this case, a complete defense. The statute of limitations for defamation is one year. (Code Civ. Proc., § 340, subd. (c).) The statute begins to run when the cause of action accrues. (Code Civ. Proc., § 312.) A cause of action for defamation accrues when the defamatory statement is published, which "occurs when the defendant communicates the defamatory statement to a person other than the person being defamed. [Citations.]" (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1247.) "While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper. [Citations.]" (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112 (*Jolly*).)

Harrison's essential argument is that he did not learn of the purported defamation until Sherwood's deposition in his first case against defendants in July 2006. Defendants, however, argue that Harrison was at least on inquiry notice as of October 2003 regarding any alleged defamation. They point to Harrison's deposition, in which he recounted the phone call with Bishop on October 25, 2003, informing him not to return to CGC: "He told me that [Sherwood] told him that — that I had some issue with Florence [Mansfield], and that — he felt that because I had an issue with Florence and I had an issue with Tony [Gadd-Claxton], then that was going to be it for me."

Harrison claims that this conversation did not inform him of the precise nature of the conversation, and he could not have found out about it before Sherwood's deposition. Thus, he asserts the discovery rule exception applies. "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . [T]he limitations period begins once the plaintiff '"'has notice or information of circumstances to put a reasonable person *on inquiry* . . . .'"' [Citation.] A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly, supra,* 44 Cal.3d at pp. 1110-1111, fn. omitted.)

The facts here "are susceptible of only one legitimate inference" (*Jolly, supra,* 44 Cal.3d at p. 1112), which is that Harrison has no basis to claim that the discovery rule applies in this case. Harrison was informed almost immediately following his termination from CGC that Bishop[4] had a conversation with Sherwood about his

[4] Harrison also contends that Bishop was his fiduciary and "fraudulently concealed" the content of his communications with Sherwood. Even if we accept this argument as valid, the information Bishop gave Harrison was sufficient to trigger inquiry notice.

"issues" with, among others, Mansfield. He was aware there had been a troublesome "interaction" between himself and Mansfield (*Harrison v. Capital Group, supra,* G038127) and that his complaint to Sherwood had upset Mansfield. (*Ibid.*) He further testified that during his time at CGC, he felt Sherwood "had threatened me while I was there regarding my reputation." He made a similar allegation in his first complaint against defendants.

Taken together, this was more than sufficient to give Harrison a "suspicion of wrongdoing" sufficient to trigger inquiry notice. (*Jolly, supra,* 44 Cal.3d at pp. 1110-1111.) Rather than act on that notice, however, Harrison did nothing. As we have noted, Harrison filed his first complaint against defendants almost immediately after his termination. Given what he already knew, there was no reason for him to delay discovery regarding the conversation Bishop had had with Sherwood. Information about that conversation would have been readily available to him during litigation. But Harrison did no discovery during his initial lawsuit, instead dismissing the case after seven months. After he filed his second lawsuit, in July 2005, he did not propound discovery until March 2006, after which CGC produced Sherwood's notes regarding her October 2003 conversation with Bishop.

The statute of limitations for defamation and other civil torts is grounded in important policy considerations. "Civil statutes of limitations protect defendants from the necessity of defending stale claims and require plaintiffs to pursue their claims diligently. [Citations.] They are '"designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."' [Citations.]" (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 488.)

The many "triable issues of material fact" that Harrison asserts do not overcome the bar of the statute of limitations, which is a complete defense. Thus, the trial court correctly concluded that the one-year statute of limitations barred Harrison's defamation claim as a matter of law. Summary judgment, therefore, was properly granted.

Motion for Protective Order

In November 2007, eleven months after filing the instant case, Harrison noticed the deposition of John Phelan, the president of American Funds Service Company, which is a division of CGC. None of Harrison's prior discovery requests had sought any information regarding Phelan's knowledge of the facts surrounding the current litigation. Upon receiving notice of the deposition, defense counsel wrote to Harrison's attorney, informing him that Phelan had never met Harrison, had never supervised him, and had no knowledge of any conversation between Bishop and Sherwood. Counsel requested that the deposition be taken off calendar. In response, Harrison's counsel asserted that defense counsel should read Sherwood's deposition from the previous case, which would "remove any mystery as to why I need [Phelan's] deposition testimony . . . ."

Defendants sought a protective order, arguing that neither Sherwood's prior deposition testimony or any other facts demonstrated any legitimate reason for taking Phelan's deposition. Harrison opposed, arguing that Phelan made the final decision not to renew Harrison's contract. Harrison responded, claiming: "Plaintiff needs to know, among other things, whether the decision to terminate and/or not renew [Harrison's] employment contract was due in whole or in part to the defamatory remarks made by [Sherwood], the essence of which is Defamation, and an element of damages must be proven, and the need for the deposition of John Phelan is patently obvious!" The court granted the protective order.

We will not disturb a trial court's discovery ruling absent an abuse of discretion. (*Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1286-1287.) It does not constitute an abuse of discretion to grant a protective order for the deposition of a corporate officer, "absent a reasonable indication of the officer's personal knowledge of the case and absent exhaustion of less intrusive discovery methods." (*Id.* at p. 1287.)

Neither is present here, and Harrison cannot establish that any less intrusive discovery methods were ever attempted. Further, his only argument with respect to Phelan's deposition and the summary judgment motion is with respect to alleged "republication" of Sherwood's purportedly defamatory statements. Even if the statements were republished, the claim accrues on the date of first publication. (*Shively v. Bozanich, supra*, 31 Cal.4th at p. 1237.) Thus, any information Phelan had was irrelevant to the summary judgment motion. We find the court did not abuse its discretion in granting the protective order.

Continuance

Harrison next argues that the trial court should have granted his request for a continuance pursuant to Code of Civil Procedure section 437c, subdivision (h), which was included in his opposition to defendants' motion for summary judgment, filed in January 2008. Under subdivision (h), "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just."

Harrison's attorney at the time was Philip P. DeLuca. His declaration stated that since he had taken over the case in October 2007, defense counsel had "stonewall[ed]" discovery requests, which, he claimed, had delayed Sherwood's

deposition. He also pointed to defendants' opposition to Phelan's deposition. He stated that he had diligently propounded discovery and "critical discovery [had] not been completed in this case . . . ." He stated that Sherwood's deposition was scheduled to be completed on January 11, 2008, and the deposition of another CGC witness, Mark Khansary, was scheduled for January 23.

The affidavit submitted by DeLuca did not meet the statutory requirements. Defendants' summary judgment motion was fundamentally based on the statute of limitations and tolling questions, and to justify further time for discovery, he was required to point to some showing some evidence relating to those issues might exist if further discovery were permitted. He did not do so in his request and does not now point to any evidence relating to those issues that could have been presented, even though a new deposition of Sherwood was, in fact, taken. A new deposition of Sherwood did not provide anything further on when the allegedly defamatory statements were made, or when Harrison was on notice as to those statements. Without citation to Sherwood's deposition, DeLuca's affidavit claims that Sherwood "changed her testimony" about the reasons for the termination of Harrison's contract, but does not explain what light such statements might shed on the issues raised by the summary judgment motion. In short, he failed to identify what "facts essential to justify opposition" may exist but could not be presented to the court. (Code Civ. Proc., § 437c, subd. (h).)

Further, Harrison and his counsel had access to all of the discovery from the prior case, which, Harrison admitted, constituted "hundreds of pages of documents." He also had Sherwood's 2006 deposition, upon which the defamation claim was actually based. He does not, on appeal, point to any new evidence from the depositions of Khansary or Sherwood, both of which took place prior to the hearing on defendants' motion, that might have supported his opposition to the motion for summary judgment.

This case is far different from the case from this court on which Harrison relies, *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389). In that case, counsel's

affidavit requesting a continuance stated that a key witness had testified in conflict with the declarations made supporting the motion for summary judgment. (*Id.* at p. 396.) Deposition transcripts would not be available for another week, and another witness with information directly pertinent to the substance of the plaintiff's claims had yet to be deposed. Further, there was an ongoing dispute regarding a request for production of documents that was critical to the plaintiff's case. (*Ibid.*) The information unavailable at the time clearly qualified as "facts essential to justify opposition" under the statute. (Code Civ. Proc., § 437c, subd. (h).)

The instant case could hardly be more different. This is not a complex case. This is a single claim of defamation arising from one conversation between two people. Although this case was not long in the tooth at the time of the summary judgment motion, we cannot ignore that litigation between the parties had been going on continuously since 2003. The issues at summary judgment concerned primarily the statute of limitations — when did the cause of action accrue, and when did Harrison have inquiry notice of the claim? The affidavit DeLuca submitted did not identify anything further facts essential to opposing the motion, nor does Harrison now point to any evidence that he was prevented from offering in opposition. We find no error.

Judge Choate's Orders

Harrison argues that Judge Choate's order memorializing his decision to grant summary judgment must be vacated, because it was signed after Judge Choate disqualified himself. He also argues that all of Judge Choate's prior orders in this matter should be vacated.

Harrison argues that the fact of Judge Choate's recusal itself is not at issue here, arguing the only proper grounds for contesting a recusal is via writ of mandate. Although recusal is not an appealable order (see Code Civ. Proc., § 170.3, subd. (d)), it can be raised on appeal from a final judgment. (*Oak Grove School Dist. v. City Title Ins.*

Co. (1963) 217 Cal.App.2d 678, 693.) Defendants did not bring a cross-appeal on the issue, so we shall not rule on it directly, but rather in the context of whether Judge Choate's orders in this case were valid.

Harrison is correct that because Judge Choate did not file a response, we are required to accept the *facts* in Harrison's motion and declaration for recusal. (*Oak Grove School Dist. v. City Title Ins. Co., supra,* 217 Cal.App.2d at p. 702.) We need not, however, accept Harrison's legal conclusion that recusal was required. Harrison's motion was based entirely upon the following comment at the hearing on defendants' motion for summary judgment: "We've all committed defamation in our life, all of us have, and the Legislature says, you know, on these kinds of cases, we're not going to let it go on for five years where somebody can come back five years later and sue somebody for the something that happened five years ago, we're going to set a statute of limitations for this action, and they set it at one year. Looks like it's outside the statute."

Bias is grounds for judicial recusal if "A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).) The record does not demonstrate any other facts supporting recusal, and we do not give Judge Choate's offhand comment, the only fact upon which Harrison relies, the same interpretation that Harrison does. In context, it appears to be merely a casual comment about human nature — that we have all said unkind things about another person at some point that could, possibly, be interpreted as defamation, and because of the nature of the tort, the Legislature has chosen to enact a statute of limitations. We do not find that this comment either constitutes an "admission" that Judge Choate was a tortfeasor or biased in defendants' favor. Thus, while we accept the facts as stated in Harrison's motion for recusal, we decline to accept his legal conclusion that recusal was required. Judge Choate's orders were, therefore, valid.

Motion for New Trial

Harrison next claims that the trial court erred by denying his motion for a new trial. He argues irregularities in the proceedings, errors in law, and newly discovered evidence justified granting his motion for new trial. We review the court's decision granting or denying a new trial for abuse of discretion, and we will not disturb the ruling unless it is plainly wrong. (*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 858; *Cope v. Davison* (1947) 30 Cal.2d 193.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. [Citations.]" (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

With respect to irregularities in the proceedings, Harrison once again raises the issue of Judge Choate's ruling on the summary judgment motion. For the same reasons discussed *ante*, we find no abuse of discretion in the trial court's denial of a motion for new trial on this ground.

Harrison next claims that the trial court's decision that summary judgment was proper, based on the statute of limitations, was an error of law. For the same reasons discussed *ante*, we disagree, and find no abuse of discretion in the trial court's denial of a new trial. He also argues that defendants failed to justify summary judgment because they did not establish there was a triable issue as to any material fact. The complete defense of the statute of limitations, however, removes any question of triable issues, and there was overwhelming, uncontroverted evidence that the statute of limitations had run.

Harrison further argues that he was entitled to a new trial based on "newly discovered evidence," because he should have been granted a continuance to conduct further discovery. This is not, however, the standard for granting a new trial based on newly discovered evidence, which requires an actual proffer of newly discovered, material evidence that could not have been discovered earlier. (Code Civ. Proc., § 657,

subd. 4.) It is not sufficient to argue that a continuance should have been granted under a different statute to justify a new trial, which requires a showing of *specific* evidence that could not have been discovered earlier.

III

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.